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IN THE

Supreme Court of the United States

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL

Appellants

v.

UNITED STATES OF AMERICA, ET AL

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1962

No. _____

ATLANTIC COAST LINE RAILROAD COMPANY, ET AL

Appellants

v.

UNITED STATES OF AMERICA, ET AL

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA

STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, Atlantic Coast Line Railroad Company, et al, Appellants, submit herewith this statement, particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the United States District Court for the Middle District of Georgia, entered on April 18, 1962.[1]

[1]Reference to the page number of the record in the proceeding before the Commission will be preceded by "Tr.", to the brief of the Government before the lower Court by "G", to the brief of Southern before the lower Court by "S", to the brief of plaintiffs, appellants herein, before the lower Court by "P", to the record before the Supreme Court by "R" and all will be parenthetically expressed.

OPINIONS BELOW

The opinions of the specially constituted District Court of Three Judges are reported at 167 F. Supp. 747 and —F. Supp. —. The reports of the Interstate Commerce Commission are found at 300 I.C.C. 125 and 313 I.C.C. 752. The opinions of the District Court are set forth in the appendix attached to this statement as Appendix A and B, respectively. The reports of the Interstate Commerce Commission are reproduced in the appendices as Appendix C and D to this statement. The appendices are attached hereto as a separate volume.

BASIS OF JURISDICTION

I.

This cause of action was brought by Atlantic Coast Line Railroad Company, Louisville and Nashville Railroad Company, and Georgia Rail Road and Banking Company, operated as Georgia Railroad by its Lessees, Atlantic Coast Line Railroad Company and Louisville & Nashville Railroad Company, in which certain shippers intervened as plaintiffs, under 28 U.S.C.A. 1366, 1398, 2284 and 2321-2325, to set aside an order of the Interstate Commerce Commission.

The order of the Interstate Commerce Commission was entered under Sections 15(3) and 15(7) of the Interstate Commerce Act, 49 U.S.C.A. §§ 15(3) and 15(7), permitting the cancellation of joint rates via certain through routes for the transportation of coal from Kentucky, Tennessee and Alabama to certain points in Georgia and Florida, after a finding that the protesting parties had failed to show countervailing circumstances sufficient to overcome certain legal conclusions purportedly reached by the United States District Court in remanding the case to the Commission for further proceedings and a finding that said cancellation would not constitute a violation of Section 3(4) of the In-

terstate Commerce Act prohibiting discrimination between connecting carriers.

II.

The final judgment of the United States District Court for the Middle District of Georgia was entered on April 18, 1962. Notice of appeal was filed in said Court on May 15, 1962. By order entered May 18, 1962, the Clerk of the United States District Court for the Middle District of Georgia was ordered to transmit the original records in lieu of copying said records, to the United States Supreme Court. The time for docketing this appeal is July 14, 1962, under Rule 13 prescribed by the United States Supreme Court, and 28 U.S.C.A. § 2101 (a).

III.

The jurisdiction of this Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C.A. § 1253 and 2101 (d), and is sustained by **United States v. Drum** (1962), 368 U. S. 370, 7 L.Ed. 2d 360.

STATUTES INVOLVED

The National Transportation Policy (49 U.S.C.A. preceding Sections 1, 301, 901 and 1001). as well as the principal provisions of the Interstate Commerce Act [49 U.S.C.A. §§ 1 (4), 1 (5), 3 (4), 15 (3) and 15 (7)] and Administrative Procedures Act [U.S.C.A. §§ 1006, 1007 and 1008] are set forth in Appendix E to this statement. Appellants also take the position that the action of the Commission and the District Court complained of constitutes a denial of due process of law in violation of the Fifth Amendment to the United States Constitution.

QUESTIONS PRESENTED

The questions presented by this appeal are as follows:

(1) Where a Statutory Three-Judge District Court vacates an order of the Interstate Commerce Commission and remands the case to the Commission for further proceedings, does the failure to appeal the District Court's decision render same the "law of the case"?

(2) Where the Interstate Commerce Commission enters an order continuing in full force and effect its prior order which had been vacated and set aside by a Federal Court, would such action be unlawful and the order in question invalid?

(3) Where an administrative agency has instituted an investigation into proposed changes published in railroad tariffs prior to the effective date of such publications, can any decision or opinion, which is interlocutory in nature and not final, eliminate or alter the issues properly raised by that investigation until a final determination of those issues even though the Commission did not exercise its power to suspend said publications under Section 15(7) of the Interstate Commerce Act, 49 U.S.C.A. § 15(7)?

(4) On appeal from the decision of the Interstate Commerce Commission, did the specially constituted Three-Judge District Court misconstrue its function and exceed its authority in attempting to rescue the Commission by making findings *de novo* which the Commission itself was unable or unwilling to make?

(5) Do the provisions of Section 3(4) of the Interstate Commerce Act, 49 U.S.C.A. § 3(4), effectively declare discrimination between connecting carriers to be unlawful in all its forms without qualification or limitation as to particular types of cases?

(6) In refusing to set aside and permanently enjoin the order of the Interstate Commerce Commission permitting the cancellation of joint rates via certain through routes that had been in existence and relied upon by the public for a half century prior to the publication of changes at issue herein, did the District Court merely give "lip service," thereby mis-

apprehending and grossly misapplying the standard for determining the substantiality of evidence as approved by this Court in *United States* v. *Pierce Auto Freight Lines* (1946), 327 U.S. 515, 90 L.Ed. 821?

STATEMENT OF THE CASE

This is an appeal from a final judgment of a specially constituted United States District Court of Three Judges which sustained the validity of an Interstate Commerce Commission order permitting the cancellation of railroad joint rates via certain through routes which had been in effect and utilized by the shipping public for more than a half century in connection with the movement of coal from Kentucky, Tennessee and Alabama to points in Georgia and Florida.

By tariff schedules to become effective January 6, 1956, the Southern Railway and its subsidiary, the Georgia, Southern & Florida Railway, sought to cancel joint rates via certain routes for the movement of coal originating on the Louisville & Nashville Railroad Company[2] in Kentucky, Tennessee and Alabama when destined to points located on the GS&F Railway Company south of Macon, Georgia, to and including Jacksonville and Newco, Florida. For many, many years there have been four routes in existence for the movement of this coal:

(1) L&N to Atlanta; Southern to Macon; GS&F to destination.

(2) L&N to Atlanta; Georgia Railroad to Macon; GS&F to destination.

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[2]Also included were origins on the Nashville, Chattanooga & St. Louis Railway, which is now a part of the Louisville & Nashville Railroad Company, hereinafter referred to as the L&N. The merger was effectuated after the initial record herein was made and the effect of that merger on this particular proceeding will be explained later.

(3) L&N to Atlanta; Central of Georgia Railway to Macon; GS&F to destination.

(4) L&N to Atlanta; Atlantic Coast Line to Cordele, Georgia; GS&F to destination.

Under Southern Railway's tariff schedules all of the above-mentioned routes would be eliminated in the competitive commercial sense except Route No. 1 due to the cancellation of joint rates on this particular traffic. However, such tariff schedules were suspended by order of the Commission on January 5, 1956, in Investigation and Suspension Docket No. 6538.

Upon consideration of the record, an Examiner's proposed report, exceptions and replies thereto, Division 2 entered its report and order on March 19, 1957, in *Routing, Coal From Origins on Louisville and N. R. Co.*, 300 I.C.C. 125. Therein, Division 2 held that with respect to I&S 6538:

> ". . . The bridge routes sought to be eliminated are not unduly circuitous, and the shipper testimony before us is in favor of continuing those routes. Considering our duties under the National Transportation Policy to maintain a transportation system adequate to meet the needs of commerce generally and of the national defense, we are not satisfied that the respondents have met the burden resting upon them of showing that the cancellation of the bridge routes proposed would be consistent with the public interest . . . **We find that the proposed cancellation of joint rates** and routes is not shown to be just and reasonable." (Emphasis supplied.)

Southern Railway filed a petition for reconsideration of the Commission's decision referred to above and the effective date of the order requiring cancellation of the involved schedules was stayed pending final disposition of the issues raised therein. However, the petition for reconsideration was denied by the Commission and a subsequent petition by Southern to stay the effective date of the modified order was

also denied. Thus, the schedules in the Investigation and Suspension Docket 6538 were cancelled on October 5, 1957.

Thereafter, on December 18, 1957, a complaint was filed by Southern in the United States District Court for the Middle District of Georgia, seeking to have the Commission's decision in this case set aside. Said complaint was predicated on the grounds that the Commission's action in this proceeding was arbitrary, capricious, an abuse of discretion, and not in accordance with the evidence presented or the law applicable thereto. It was, therefore, contended that such arbitrary action resulted in the issuance of an order that unlawfully deprived Southern of its long haul and of revenues from such transportation to which its was allegedly entitled.

Upon review, the Statutory Three-Judge District Court accurately described the nature of the proposal involved in *Southern Railway Company* v. *United States*, 167 F. Supp. 747, at page 750:

> "**Seeking to eliminate the joint rate** as existing for all routes except the direct route, No. (1), and thus obtaining for itself the maximum haul without effective competition, the Southern filed with the Commission schedules **proposing to eliminate the joint rates** . . ." Emphasis Supplied.)

In addition, the Court specifically stated the basis upon which its decision would rest at page 752:

> ". . . Our disposition of the case is based on the nature of the findings and conclusions of the Commission. . ."

The Court then quoted in full the three basic findings upon which the Commission had concluded that the proposed schedules were not shown to be just and reasonable, i.e., such cancellation would not be consistent with the public interest since (1) the routes in question are not unduly circuitous, (2) shipper testimony is in favor of continuing those routes, and, (3) the needs of commerce generally and of the

national defense require the maintenance of the status quo. Upon consideration thereof, the Court held that these basic findings, as well as the Commission's conclusion in connection therewith, would have been valid insofar as the Central of Georgia route was concerned, but "it is not within our province to give effect to a part of the suspended schedule and to cancel other parts of it." Thus, the Court did not hold that the Commission's refusal to permit the cancellation of joint rates over long-established routes would constitute an arbitrary or unlawful deprivation of Southern's alleged right to its long haul and of revenues from such transportation as had been charged in the complaint.

As to the Atlantic Coast Line and Georgia Railroad route, the Court said that the Commission may well have considered the factors necessary to support its conclusions on the initial record but that, if it had, they were not reflected in the report and order under attack. The Commission alone may make such a determination between conflicting interests and the Court merely held that the limited findings which had been made by the Commission were not sufficient. This, for the reason that, in the absence of any consideration given to other pertinent factors, Southern Railway had established a so-called "prima facie" case on the grounds that the routes in question were unduly circuitous and, therefore, uneconomical. However, the Court hastened to say that wasteful operation in the economic sense is to be avoided only "if such elimination does not run counter to other mandates of the act."

The economic loss to which the Court referred is a geographical fact that has been in existence since the inception of these rates more than a half century ago and which is prevelant throughout the transportation industry i e some routes are longer than others. For example, as stated by the Court in *Southern Railway Company* v. *United States*, *supra*, at page 755:

"To the extent that the Commission's finding that the two longest routes 'are not unduly circuitous' is intended to mean that they are not undesirable from an economic standpoint, the record does not support a conclusion, and such a finding is clearly erroneous. As to the Central of Georgia route, we cannot say the same. The route is so little longer than that of the Southern that we cannot overrule the Commission's finding that as to that route the Southern failed to carry its burden of showing its elimination is consistent with the public interest."

Thus, as reflected in the Court's opinion, Southern Railway's so-called prima facie case was relagted to the showing that a part of one route is longer than a part of another route. In view of that fact, the Court concluded that the failure of the Commission to make findings of fact which could be considered as offsetting the longer distance via those routes:

". . . make it impossible for us to determine between conflicting interests, which determination it [the Commission] alone may make."

Among the considerations which the Court stated that the Commission might properly weigh to counteract the prima facie case made by Southern were:

(1) "The need for competing lines in this particular traffic;

(2) "The need for the interchanges between these carriers for continued efficient transportation of this traffic or in general;

(3) "The effect on such interchange and on the economic position of the other carriers of the elimination of these joint routes for coal;

(4) "The effect of such elimination on the carriers concerned in relation to their ability to furnish adequate service if and when needed for the national defense."

> "The difficulty we have in reviewing the Commission's order here is that **no basic findings are made as to any of these considerations.**" (167 F. Supp. 754. Emphasis Supplied.)

In view of the foregoing, the Court remanded the case to Commission for further proceedings not inconsistent with its opinion and in doing so, stated at page 755:

> "It is not within our province to give effect to a part of the suspended schedule and to cancel other parts of it."

In the light of the foregoing, it was obviously the intention of the Court that the status quo should be maintained until a legally valid report and order had been issued by the Commission. Therefore, to the extent that Southern had established a prima facie case on the longer haulage via the routes in question and the extra interchanges shown in the initial record, it was incumbent upon the Commission to either review the prior record with a view of so shaping its report and order as to be in accordance with the opinion of the Court or permit such additional evidence as would be necessary to make basic findings sufficient to support the validity of an order properly and legally disposing of the issues raised therein. In fact, the Court said that the Commission could so shape its report and order as to permit the cancellation of joint rates via two of the routes but not the Central of Georgia route. However, this was neither a conclusion drawn by the Court nor a requirement placed upon the Commission as the Court specifically said "we do not even conclude that the Commission must do this." Especially so, since the further proceedings which the Court did order would necessarily be within the primary jurisdiction of the Commission.

In view of the fact that the initial record was then three years old and the fact that significant changes had occurred bearing on the issues involved, the Coast Line, L&N and Georgia Railroad filed a petition on December 11, 1958,

seeking to have I&S 6538 reopened for further hearing or, in the alternative, oral argument before the entire Commission. While these Appellants confidently believed, and so stated in their petition, that the initial record was sufficient to enable the Commission to make specific and adequate findings of fact to sustain its previous order in toto, they were of the opinion that the record should be supplemented with additional evidence concerning the factors which the Court said would be pertinent.

Upon consideration of said petition, as well as Southern Railway's reply thereto, the Commission entered its order on March 23, 1959, modifying its prior order in I&S 6538 requiring cancellation of joint rates via the Coast Line and Georgia Railroad routes and granting further hearing for the purpose of developing additional evidence to determine whether cancellation of such rates would be consistent with the public interest and otherwise lawful. Insofar as the Central of Georgia route was concerned, the Commission stated that its prior order (which had been set aside by a Federal Court) "continues in full force and effect."

Thereafter, in June of 1959, Southern Railway republished its tariff schedules[3] so as to show an increase in the rates on this traffic when the Coast Line and Georgia Railroad routes were used from and to the points here involved. This, for the reason that, as previously pointed out, the prior schedules had been effectively cancelled on October 5, 1957, prior to the initial Court case. However, such schedules were published on statutory notice and were subject to protest by interested parties. All carriers affected by those publications filed protests and, believing that, in all fairness to the parties, the status quo should be maintained until a valid order could be issued, requested that the publication be suspended. Al-

[3]Supplements 78 and 82 of Tariffs, I.C.C. Nos. 1427 and 1499 respectively (currently contained in S.F.T.B. Freight, Tariff 834-C, I.C.C. 5-62.)

though refusing to suspend and thereby causing the schedules to become effective as published on July 13, 1959, the Commission did state that there is reason to institute an investigation into the lawfulness thereof and ordered such investigation in I.C.C. Docket No. 33128 on July 10, 1959, pursuant to the provisions contained in Sect. 15(7) of the Interstate Commerce Act.

Thus, the two proceedings, I&S 6538 and ICC 33128, were thereafter heard on a consolidated record in Atlanta, Georgia, on November 30-December 1, 1959, before Examiner Albert E. Luttrell. At the request of the Examiner, protestants, appellants herein, agreed to present their evidence first at the further hearing with the understanding that their action in doing so did not constitute a voluntary assumption of any part of the statutory burden of proof which Southern was required to sustain in those proceedings. Therefore, evidence was presented by the protestants, appellants herein, relative to the rates, routes, distances, circuity, earnings, and operations via the restricted routes as against the retained routes to show that such restrictions were completely unwarranted. In fact, changed traffic and operating conditions (which had occurred since the initial record was made and reviewed by the Court) showing faster service via the Retained routes and elimination of interchanges were placed into the record on further hearing.

On the other hand, the evidence introduced by Southern merely shows gross capital expenditures, freight train operating averages and improvements on a systemwide basis in addition to improvements in operations over its Atlanta-Macon line without showing any deficiencies in the evidence presented by protestants, appellants herein. In fact, the initial reasons advanced by Southern Railway in support of its schedules remained unchanged during the course of the further proceedings. Southern's Freight Traffic Manager, Mr. S. R. Goodman, stated that the elimination of joint rates

via the routes in question was a part of an overall program and that (Tr. 13):

> "Under the routing provisions here involved, Southern Railway System has endeavored to eliminate intermediate railroads because inclusion of such railroads can only delay the traffic and increase the cost of operation. Interchange between railroads is expensive."

The record, however, is completely devoid of any evidence that shippers have ever complained of delay in moving the traffic via the restricted routes. In fact, shippers and receivers appeared in opposition of these schedules at each and every hearing before the Interstate Commerce Commission but none have ever appeared in support of such schedules. Moreover, Southern made no attempt to show the cost of operation over any segment of any line and was unable to show any increase in expenses incurred by it for interchanges when the traffic moved over the restricted routes.

Notwithstanding the undisputed evidence of record showing countervailing circumstances and changed transportation conditions, the Hearing Examiner seemed convinced that all issues had been predetermined by the Court and specifically stated at the outset in his recommended report dated June 10, 1960 at Sheet 2:

> "The Court **held** that Southern had sustained the burden of proving that elimination of these two bridge routes by the Georgia Railroad and the Coast Line **is consistent with the public interest and is justified;** that the shipper testimony amounted merely to expressions of desire and furnished no legal support for the Commission's conclusions; and that the facts as to distance and operation negative in law the finding of the Commission that the routes were not unduly circuitous. **There was no appeal from the Court's decision** . . ." (Emphasis supplied.)

Following a recitation of some of the contentions and issues raised by the parties, the Examiner concluded on Sheet 8 of his recommended report:

> ". . . In its opinion the Court held that elimination of the two bridge routes are in accord with the National Transportation Policy and the needs of national defense. **This holding has not been disproved by protestants** . . . no one showed that there was any need from the standpoint of national defense or otherwise for the two routes here involved.
>
> ". . . The evidence on further hearing fails to offset the holding of the Court that the proposed elimination of routes is consistent with the public interest and is fully justified."

Exceptions on behalf of protestants, appellants herein, to the Examiner's recommended report and order were filed December 12, 1960; and a reply thereto was filed by Southern Railway on January 3, 1961.

In its decision of May 19, 1961, as reported in *Routing, Coal From Origins on Louisville and N. R.*, 313 I.C.C. 752, the Commission, by its Division 2, specifically stated at page 747: "The question here, however, is whether cancellation of those routes **(in connection with the lowest joint rates)** is consistent with the public interest under Sect. 15 (3).

In holding that the schedules were justified, the Commission merely took excerpts from the recommended report and paraphrased other statements by the Examiner. Neither the Examiner, in his recommended report, nor the Commission, in its decision, made findings with respect to Section 1(4) and 1(5) issues although they were specifically raised by the parties as reflected in the record and in every pleading filed by protestants, appellants herein. In fact, the Examiner neglected to even mention either issue whereas Division 2 did at least mention the Section 1(4) issue but failed to make a finding with respect thereto.

Petition for reopening, reconsideration and oral argument on behalf of protestants, appellants herein, was filed June 26, 1961, and a reply thereto was filed by Southern Railway on July 18, 1961. Thereafter, the Commission entered its order dated September 13, 1961, and served on the parties September 29, 1961, summarily denying said petition for reconsideration.

Therefore, on November 14, 1961, a complaint was filed by these appellants in the United States District Court for the Middle District of Georgia seeking to have the Commission's further decision in this case set aside. Said complaint was predicated on the grounds that the Commission order complained of was based on errors of law, was neither supported by the evidence of record nor based upon adequate findings, and that its action *in permitting the cancellation of such rates* was arbitrary, capricious, and an abuse of discretion. It was, therefore, contended that such arbitrary action resulted in the issuance of an order that deprived these railroad plaintiffs of property without due process of law and will prevent the utilization of efficient and economical routes which the public has used for years, thereby causing a diminution of service affecting the movement of other commodities and resulting in irreparable damage to these appellants.

The Honorable Elbert P. Tuttle, Chief Judge of the Fifth Circuit, entered an order on November 28, 1961, designating Griffin B. Bell, United States Circuit Judge, the Honorable W. A. Bootle, United States District Judge for the Middle District of Georgia, and the Honorable Lewis R. Morgan, United States District Judge for the Northern District of Georgia, as the Statutory Three-Judge District Court to hear and determine this cause of action. Various parties were thereafter allowed to intervene as additional plaintiffs[4]

[4]Parties allowed to intervene as additional plaintiffs: Harlan County Coal Operators Association, The Mead Corporation and Georgia Kraft Company, appellants herein.

or defendants[5] and a joint answer to the complaint was filed on behalf of the Government by the Interstate Commerce Commission January 13, 1962.

Following submission of briefs and a reply brief by plaintiffs, appellants herein, the case was argued before the specially constituted Three-Judge District Court, at Macon, Georgia, on March 28, 1962. In its review, the Court reiterated the fact that it had previously "set aside" the Commission's order of March 19, 1957, but now concludes that it was not prejudicial error and indeed lawful for the Commission to continue in full force and effect a part of said order without prior relief from the Federal Court which had set it aside. Such a retroactive but inconsistent conclusion was apparently predicated on the grounds that its previous comments in the initial review concerning the Central of Georgia route constituted *the law of the case* since the Court now says that by virtue of the Commission's action in continuing an administrative order which had been set aside by a Federal Court:

> "... Southern was not permitted to file schedules cancelling it (the joint rates applicable via the Central of Georgia route)" (Emphasis supplied).

In addition, the Court persistently referred to the cancellation of routes and the cancellation of through routes embracing Coast Line and the Georgia Railroad, thereby concluding by making a finding that:

> "The routes were closed and no question was left as to rates..."

Having enumerated the findings which it says the Commission made, the Court held that such findings were warranted in law and in fact when tested by Sections 15(3) and 15(7) of the Interstate Commerce Act. It was further

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[5]Parties allowed to intervene as additional defendants: Interstate Commerce Commission and Southern Railway System Lines.

held that findings with respect to Section 1(4) and 1(5) of the Act were neither made by the Commission nor necessary since "no question was left as to rates." As to the discrimination provisions of Section 3(4) of the Act, the Court said, "we are not here concerned with switching or terminal services" and "the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia." Therefore, the action to have annulled and set aside the Commission's order complained of was denied.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

In addition to seeking the correction of errors in fact and in law committed by the Court below, appellants are asking this Court to condemn a philosophy of judicial review based upon the application of a tectnique and a standard which are completely at variance with those previously established by the Supreme Court. The standard applied by the District Court in this case for determining the substantiality of the evidence, far from being sanctioned by *United States* v. *Pierce Auto Freight Lines* (1946), 327 U. S. 515, 90 L.Ed. 821, is indeed based upon a misapprehension and gross misapplication of the standard approved by this Court in that case. Moreover, mere recitation without application of such standards, as is the case here, has neither been sanctioned nor condoned by this Court and it should not do so now.

Merely stating briefly some of the more important errors made by the District Court shows how far it strayed from the standards which this Court has set up for reviewing orders of the Commission concerning rate changes under Section 15(3) and Section 15(7) of the Act.

a.

The District Court made a finding that "no question was left as to rates" thereby sweeping aside issues pertaining to

Sections 1(4) and 1(5) of the Act. That conception of the scope and function of the investigation proceeding by the Commission in I.C.C. Docket No. 33128 (erroneously referred to by the Court in its opinion as a suspension docket) is inimical to the very order initiating the proceeding as well as to Section 15(7) of the Act, by virtue of which said investigation order was issued. In fact, both the investigation order and Section 15(7), by their very terms, concern themselves with the **lawfulness** of the proposed rates which must conform to all provisions of the Act which set forth standards of lawfulness, including Sections 1 and 3. As the Court held in *United States* v. *Perko*, 133 F. Supp. 564, 570, "The people may change the law of the United States but the Court cannot do so."

That investigation was instituted prior to the effective date of Southern's republished tariff restrictions and the mere fact that the Commission did not exercise its power to suspend as it had previously done in I&S 6538 cannot change the issues properly raised therein. Both orders were issued pursuant to the provisions of Section 15(7) and the only distinction that can be drawn is that under the suspension order the rates could have become temporarily effective after a period of seven months subject to a final determination of the issues, whereas under the investigatory order the rates became temporarily effective immediately subject to a final determination of the issues raised therein.

Taking Warner Robins, Georgia, as a destination, it was shown in Exhibits 47 and 51 that from the Windrock base group the rate in effect via the Georgia Railroad route on July 12, 1959, was $4.61 per net ton, whereas today it is $4.95. Similarly, the rate to Warner Robins from the same group mines via the Coast Line route is considerably ($3.27) higher than the rate in effect via Southern Railway and Central of Georgia routes today (Exhibit Nos. 60 and 61). Like comparisons appear throughout Exhibits 47, 51, 60 and

61 showing that the higher combination rates over the through routes of Coast Line and Georgia Railroad are not in any way competitive as a result of Southern's restrictions.

Insofar as those restrictions are concerned, the Commission's investigation order of July 10, 1959, sets forth the specific **rate tariffs involved** including as to each "the reference mark bearing an increase symbol." Thus, the higher combination rates that became temporarily applicable on July 13, 1959, were subject to a final determination of the issues raised as to the justness, reasonableness and lawfulness of the changes brought about by Southern's action. As to those determinations, both the Commission and the Courts have held as stated in *Cancellation of Routing, Paper, Gainesville M.R. Co.*, 306 I.C.C. 515, 520:

> "An appropriate standard with which to measure the justness and reasonableness of the rates over the Gainesville Midland routes (here Coast Line and Georgia Railroad routes) is the level of comparable rates from and to the same points over the competitive routes (here Southern and Central of Georgia routes). See *Carolina, C & O Ry. Co.* v. *Southern Railway Co.*, 299 I.C.C. 335; sustained *Southern Ry. Co.* v. *United States*, 153 F. Supp. 57." (Parentical expression supplied).

Commenting on Section 15(7) of the Act, the Court stated in *Long Island Rail Road Company* v. *United States* (1961), 193 F. Supp. 795, at page 800:

> " . . . It can hardly be doubted that limiting the effectiveness of a rate to one of a number of routes is a 'regulation or practice affecting any rate.' "

Here, the Commission order of July 10, 1959, initiating the investigation specifically referred to the **rate tariffs involved** including as to each "the reference marks bearing an **increased symbol."** This fact is further reflected in the tariffs which were filed with the court below in a rather igno-

minious fashion.[6] Thus, the finding made by the Court is in irreconciliable conflict not only with the Commission order instituting the investigation under review but with the very terms of the statute by which the Court itself says the administrative decision is to be tested, i.e., Section 15(3) and 15(7) of the Interstate Commerce Act.

b.

The District Court persistently referred to the cancellation of routes and even the cancellation of "through" routes embracing Coast Line and Georgia Railroad thereby concluding that such routes "were closed." In fact, the Court fell into hopeless conflict with itself in attempting to describe the schedules involved on page 2 of its opinion:

> " . . . These tariffs cancelled through routes embracing the Georgia Railroad and the Atlantic Coast Line Railroad Company . . . thereby eliminating them from participation in the lowest competitive joint rates on coal . . ."

In contrast with the foregoing the same Court stated in its initial review of these proceedings in *Southern Railway Company* v. *United States, supra,* at page 750:

> "Seeking to eliminate the joint rate as existing for all routes except the direct route, (1), and thus obtaining for itself the maximum haul without effective competition, the Southern filed with the Commission schedules proposing to eliminate the joint rates . . . "

[6]Counsel for Defendant Southern Railway filed several documents (tariffs) which neither constituted a part of the official record nor were served on the parties until several days after the record was closed. No mention of these documents was made to appellants until counsel for defendant invited the Court to examine their copy during the course of his argument and after these appellants had completed their case in chief. Since the court stated that it would be a convenience to them to have the documents, counsel for these appellants stated that no objection would be made if all the parties were properly served a copy of same. While a disarranged copy was handed to one of appellant's counsel when the question was raised, the parties were not served until several days after the record was closed.

Since other traffic is moving over the through Coast Line and Georgia Railroad routes at joint rates in connection with the GS&F today, it was sheer folly for the Court to hold that such routes are "closed." Insofar as coal is concerned, there certainly can be no doubt but that through routes and joint rates were in effect via Coast Line and the Georgia Railroad at the time the Commission entered its investigation into proposed changes by Southern. Such changes would merely increase rates to be applied if the coal traffic was transported via the Coast Line or Georgia Railroad since the joint rates were being cancelled but this would not and did not change the nature of those routes. In fact, both the Commission and the Courts have held that while the existence of a joint rate necessarily presupposes the existence of a through route, a through route may exist though no joint rate has ever been applicable to it. See *Southern Railway Company* v. *United States*, 153 F. Supp. 57, 61, and *United States* v. *Great Northern Railway Company*, 343 U.S. 562, 96 L.Ed. 1142.

In *Thompson* v. *United States* (1952), 343 U.S. 549, 96 L.Ed. 1134, this Court adopted the "holding out" test as to the existence of a through route. However, the fallacy of the lower Court in relying upon the *Thompson* case results from its misstatement of the facts. It says that "Southern no longer holds itself out as offering through transportation service on coal over these routes." In the first place, Southern is not the connecting carrier with Coast Line and the Georgia Railroad for the movement of this coal traffic. Secondly, even if the Court was referring to the GS&F, which is a subsidiary of Southern, the statement is still factually incorrect since the schedules under investigation show the GS&F offers through transportation service on coal in connection with Coast Line and the Georgia Railroad but at higher rates than would be applied in connection with either the Southern or the Central of Georgia. Thirdly, the *Thompson* case certainly does not hold that cancellation of joint

rates change, *ipso facto*, the nature of the routes over which they had been applied as the lower Court otherwise implied. Finally, the *Thompson* case clearly shows that under the factual situation in this case there are still in existence through routes via the Coast Line and Georgia Railroad even under the schedules involved since the only change is that unreasonably higher rates would be applied over those routes than over others as the result of Southern's action herein.

Thus, the Court not only contradicts itself in describing the schedules but cites as authority for its finding that the involved routes are closed a case which certainly does not support such a finding but would in fact be authority for a finding exactly opposite to that made by the Court below.

c.

The District Court, although admitting that it had previously "set aside" the Commission's order of March 19, 1957, held that it was not prejudicial error and indeed lawful for the Commission to continue in full force and effect a part of said order without prior relief from the Federal Court which had set it aside. Such a retroactive but inconsistent conclusion was apparently predicated on the grounds that its previous comments in the initial review concerning the Central of Georgia route constituted *the law of the case*. Especially so, since the Court now says that by virtue of the Commission's action in continuing an administrative order which had been set aside by a Federal Court "Southern was not permitted to file schedules cancelling it."

However, since the administrative order cancelling *all* of Southern's schedules had been set aside by a Federal Court, there is nothing in the Act or in any decision of the Courts construing it or in any of the decisions by the Commission applying it that would have prevented Southern from **publishing** schedules cancelling any of the joint rates on statutory notice unless the *dicta* statements in the initial review

did, as the Court apparently now concludes, constituted the law of the case. To so hold, is tantamount to saying that the Court in its initial review made a final determination as to the "public interest" issue.

Even if it could be argued that it would not have been improvident for the Court to decide the public interest issue, it was not and could not have been a final determination for the simple reason that the case was remanded to the Commission for further proceedings. The whole proceeding thereafter was *in fieri* and the Commission had a perfect right on reconsideration to make a new record. *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364.

When the proceedings were reopened all questions were still open and could be presented. The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because Congress, notwithstanding its interlocutory character, had made it appealable.

The statute, however, does not require an aggrieved party to take such an appeal in order to protect his rights, and, where it is not taken, does not impair or abridge in any way the previously existing right upon appeal from the final decree to challenge the validity of the prior interlocutory decree. The aggrieved party may, therefore, await the final determination of the case and upon appeal therefrom raise all questions involved in the case as the appellants are doing here. See *Victor Talking Machine Co.* v. *George*, 105 F. 2d 697, Certiorari denied 308 U.S. 611. Thus, it requires a final judgment to sustain the application of the rule of "the law of the case," which is a discretional rule of practice and is not controlling here. See *Southern R. Co.* v. *Clift*, 260 U.S. 316; *United States* v. *United States Smelting R and M. Co.*, 339 U.S. 186, 198, 199, Rehearing denied 339 U.S. 972.

Here, the Commission continued in full force and effect the order vacated by the Court without making any attempt

to "so shape its report" which contained findings upon which that order was bottomed. Instead, on March 23, 1959, the Commission merely *modified* its prior order or conclusions without changing the findings or reasons which purportedly supported that order. Such action led to an unlawful and completely illogical result as the *modification* in the order permitted that which the findings in the report would not permit. Thus, before the ink was hardly dry on the Court's decision, the Commission had done precisely that which the Court had condemned, i.e. issued an order not supported by basic findings essential to its validity.

Insofar as the damage to plaintiffs is concerned, Southern Railway puts its finger directly on the pulse of the situation at page 14 of its brief before the Court below, wherein it explained the effect of such action by stating:

> "In other words, as to those two [Atlantic Coast Line and Georgia Railroad] routes . . . the Commission acted reasonably and equitably in modifying its original order . . . *so as not to forbid cancellation of the two routes.*"

Thus, in view of the foregoing, it necessarily follows that such a modification or ruling could have had, and we contended that it did have, a direct bearing upon whether like schedules, subsequently published by Southern, would be suspended by the Board of Suspension.[7] As a matter of fact, the suspension Board did act "so as not to forbid the cancellation of the two routes" and the unlawful order thereby predetermined the issue before such Board and in its decision to investigate rather than suspend those schedules in I.C.C. Docket No. 33128.

Thus, in addition to being beyond the power of an administrative body to continue in effect a part of its order which had been vacated by a Federal Court, the Commission

[7] A board of Commission employees established for the purpose of handling suspension matters pursuant to 49 U.S.C.A. § 17(2). Section 7.3, 20 F.R. 5031-5035, July 19, 1955.

did precisely that which the Court below had initially condemned but now finds is lawful, i.e., issuance of an order not supported by basic findings essential to its validity.

d.

The District Court held that the schedules do not run counter to the discriminatory provisions of Section 3(4) of the Interstate Commerce Act because the equality of treatment required in that statute "involves comparable conditions and the route of the Georgia being closed does not compare with that of Southern or the Central of Georgia" and "we are not here concerned with switching or terminal services". Such statements are certainly not sufficient in law or in fact to qualify the mandatory provisions of that statute which this Court has held "outlaws discrimination in all its forms". *Dixie Carriers* v. *United States*, (1956), 351 U.S. 56, 61, 100 L.Ed. 934.

Insofar as comparable conditions are concerned, the mileage from the point where discrimination is charged is either less or identical in performing the service for the railroads discriminated against as compared with the service performed for the preferred railroads. Moreover, there is absolutely nothing in the record to show that the expense is even a penny more for performing that service in connection with the former than in connection with the latter.

Here, services performed by the GS&F are the same at Macon whether the Central of Georgia or Georgia Railroad car is tendered under joint rates and through route arrangements which have been in effect for more than half a century. Morevover, the Court stated in *Pennsylvania Co.* v. *United States*, 214 F. 445, 449, if a reasonable compensation is fixed for the service *the carrier may not inquire into the route over which it has been moved* to reach its rails merely to decide whether or not it will transport the car offered. This decision

was affirmed by the United States Supreme Court in *Pennsylvania Co. v. United States*, 236 U.S. 351.

Oddly enough, on the circuity aspect of the public interest issue, the lower Court stated in its initial review that it was fruitless to consider the movement of the traffic before it reached the junction point at Atlanta and the Commission, apparently believing this to be the law of the case as Southern contended, based its findings as to this aspect of the public interest issue on what the Court said which the latter now says was a valid finding. On the other hand, the Court now says that consideration must be given to the entire route, not just a segment thereof, in determining the discriminatory issue. In fact, it makes a finding *de novo* which the Commission was unable or unwilling to make, i.e., no consideration should be given to switching or terminal services at the point where the discrimination is charged.

The method by which circuity of routes is measured to determine wasteful operation, as used by the Court in its initial review, certainly did not constitute the law of the case and the entire route should have been taken into consideration rather than a segment thereof insofar as the public interest issue was concerned. Conversely, only the services performed by the carrier charged with discrimination at the point where such discrimination is charged should be considered in determining whether there is a violation of Section 3(4). What other carriers do, not so charged, is completely irrelevant as is the transportation services performed prior to the time that the traffic reaches the point where discrimination is charged. Thus, only a comparison of the services performed by GS&F for its connecting carriers at Macon or Cordele is relevant as to whether it discriminates against one or more of those connecting carriers in its rates or charges for like or similar services. To hold otherwise, as the lower Court did here, would be to ignore the unqualified provisions of the statute.

It is the unequivocal duty of a railroad to treat its rail connections on an equality basis, particularly where, as here, through routes and joint rates have been in effect for a half century or more. In fact, such treatment is made mandatory by statute since Section 3(4) of the Interstate Commerce Act specifically provides that rail carriers:

> " . . . shall not discriminate in their rates . . . and charges between connecting carriers. . . ."

Thus, a rate lawful in all other respects is, nevertheless, unlawful by the terms of the aforementioned statute if it discriminates between connecting carriers. Both the Courts and the Commission have condemned efforts to explain away the mandatory provisions of that statute since the discrimination prohibited is to be tested by matters of substance. Here, the lower Court made a feeble attempt to distinguish the cases applying that statute with the case at Bar on the basis of the services involved in those cases as compared with the services involved herein citing *Louisville & N. R. Co.* v. *United States*, 238 U.S. 1, as authority for such a proposition. However, the appellants in that case attempted to do precisely what the lower Court concluded here by insisting that *Pennsylvania Co.* v. *United States, supra*, did not involve *switching* but *transportation*. Such an attempt to explain away the mandatory provisions of the statute was condemned by the Supreme Court in the *Louisville and N. R. Co.* case, *supra*, at page 20:

> " . . . but the alleged differences do not serve to take the present case out of the principle announced in that just cited. For in this order the prohibition against the existing practice and the requirement to furnish equal facilities come to the same thing."

Since other traffic is still being interchanged between the Georgia Railroad and the GS&F at Macon, it is rank discrimination to single out this coal traffic and say that higher

rates should be assessed when a car is received from the Georgia Railroad than when received from the Central of Georgia or Southern. Considering such a situation in the *Louisville and N. R. Co.* case, *supra*, the United States Supreme Court said at page 19:

> "In substance, that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others."

Particularly so, in view of the fact that all of the equipment used in transporting this coal is owned by the originating carriers, i.e., the L&N, one of the appellants herein. In fact, the evidence of record clearly shows that under Southern's routing restrictions, the L&N is permitted to deliver traffic to the Southern Railway and Central of Georgia at Atlanta, but is not permitted to deliver traffic to the Atlantic Coast Line and Georgia Railroad at the lowest applicable joint rate applying from involved mine origins to the destinations here involved (Tr. 274, 349, 350). Whereas, in *Louisville and Nashville Railroad Company, Merger, etc.*, 295 I.C.C. 457, the Commission stated:

> "We deem it imperative, however, that our order approving the merger be conditional so as to insure the maintenance of all existing joint routes . . . "

The joint routes referred to above include the Coast Line and Georgia Railroad routes here involved. Southern took an active part in that proceeding and insisted on the above-quoted provision being made a condition precedent to the Commission's approval of the merger. Moreover, in view of this condition which was made in the public interest, it seems only logical that if the originating carrier of the traffic here involved could not cancel or commercially close the routes in question, an intermediate carrier should not be allowed to do so.

Thus, the finding by the lower Court is not only unsupported by statute or case law but is completely illogical. Moreover, it was a finding *de novo* which the Commission was unable or unwilling to make, i.e., no consideration should be given to switching or terminal services. In fact, as the Supreme Court said in *U. S.* v. *Champlin Refining Co.*, 341 U.S. 290, 301:

> "... On appeal from a specially constituted Three-Judge District Court refusing to enforce an order of the Interstate Commerce Commission, it is not the function of the United States Supreme Court to rescue the Commission by making findings de novo which the Commission itself was unable or unwilling to make. ..."

Certainly if such action is beyond the function of the United States Supreme Court, it is likewise beyond the function of the District Court.

e

The District Court held that the findings made by the Commission are warranted in law and in fact when tested by the admonition of Sections 15(3) and 15(7) of the Interstate Commerce Act. In doing so, however, the lower Court attributed findings to the Commission which had not been made and failed to properly evaluate the findings which the Commission did make in the light of the statutes relied upon.

The first two so called "findings" which the lower Court attributes to the Commission are based on a comparison [not between the restricted (Coast Line and Georgia Railroad) routes and the unrestricted (Southern and Central of Georgia) routes but] between the restricted routes and the Southern route. On that basis, the restricted routes are said to (1) be "*unduly* circuitous resulting in an operation at an *unnecessarily* higher cost than was the case over the Southern route," and (2) involve "an additional interchange ... either at Macon or Cordele as compared with the route of the

Southern." To begin with, the Commission did not make a finding that the restricted routes resulted in an operation at higher cost—much less an unnecessarily higher cost—than was the case over the Southern or the Central of Georgia route. In fact, it would have been impossible for the Commission to make such a finding since there is absolutely nothing in the record to show that the expense is even a penny more when the GS&F handles this traffic for one connecting carrier than when it handles it for another connecting carrier. Moreover, in attempting to meet its burden of proof, Southern did not show the cost of operation over any segment of any line.

Insofar as the undue circuity was concerned, the Commission merely quoted the comments of the Court on the circuity aspect of the public interest issue and, apparently assuming that such was the law of the case as Southern had contended at the hearing, stated:

> "In addition to the undue circuity of the Georgia Railroad and Coast Line routes as compared with the direct Southern route, an additional interchange is required at Macon or Cordele."

As to the "additional" interchange at Macon, this constitutes nothing more than a *negative pregnant* as it would neither justify cancellation of joint rates via those routes nor qualify the discrimination charged since the unrestricted Central of Georgia route would also require an "additional" interchange at Macon. In addition, the Commission admitted that the interchange between the L&N and Coast Line at Atlanta had been eliminated thereby resulting in less interchanges being required via the restricted Coast Line route than via the unrestricted Central of Georgia route and the identical number of interchanges being required via the Coast Line route as compared with the route of Southern.

Referring to a third so-called "finding," the Court stated that "it was held also that there was no showing of any

shipper need for the routes." While the Commission referred to the shipper testimony in setting forth the contentions of the parties, it did not make a finding that such testimony expressed a desire "to have as many competing lines available as possible" nor that the expressions of fear concerning the diminution of service via the Georgia Railroad was "unsubstantial." The fact of the matter is that the Commission failed to make any finding with respect to shipper testimony. However, those fears should not have been so callously disregarded for the case at Bar represents but one of many attempts by Southern Railway to effectuate a fantastic and vicious routing program involving the use of unreasonable and often discriminatory practices which have been repeatedly condemned by the Commission and the Courts. See *Alabama Great Southern Railroad Co.* v. *United States*, 162 F. Supp. 614; *Southern Railway Co.* v. *United States*, 154 F. Supp. 562; *Southern Railway Co.* v. United States, 153 F. Supp. 57; *Southern Railway Company* v. United States, 166 F. Supp. 78. In other words, Southern's restrictive routing program is not limited to coal and the evidence of record clearly shows that its action in this instance will result in a diminution of service both on this and other traffic moving via Coast Line and the Georgia Railroad.

The so-called fourth and fifth "findings" which the lower Court attributes to the Commission are that (1) the loss of this traffic would have no significant effect on the total interchange between the Georgia and GS&F at Macon and (2) the coal traffic was not profitable to the Coast Line and Georgia Railroad. While the Commission did say that the loss of this traffic "would not appear" to have a significant effect on the total interchange there was certainly no finding to that effect. As to the profitability of this traffic to Coast Line and Georgia Railroad, the record shows that such traffic is undeniably remunerative to those carriers (Tr. 271, 272, 307, 308, 317). This is particularly true when considering

the fact that this coal is overhead traffic to the Georgia Railroad and Atlantic Coast Line, involving no loss and damage claims, and that it is handled in trains over those railroads that are not now being operated to capacity (Tr. 291, 292, 394, 409).

Here, the 164 cars handled by the Georgia Railroad in 1958 produced revenue of $69.17 per car which, with the exception of cement, is greater than any other eight principal commodities handled by that railroad in connection with the GS&F route as far as per car earning are concerned (Tr. 271, 272). As to the Atlantic Coast Line route, the coal traffic yielded per-car revenue of $65.36 which is higher than the per-car revenue on sand and gravel or crushed stone and compares favorably with the per-car revenue received on pulpwood by that railroad (Tr. 307, 308).

While the Commission stated that the statistical exercise engaged in by Southern at the hearing "indicated" the non-profitability of this traffic to protestants, appelants herein, there was certainly no finding to that effect. In that statistical exercise, the *system* average operating expenses were compared with the average revenue per loaded car-mile to determine whether the traffic would be profitable to the involved railroads but such a determination is impossible on that basis and it completely distort the picture since the record shows that this traffic moves in blocks of five to 10 cars (Tr. 11, Exhibit No. 57). Moreover, the ridiculous nature of such a comparison was specifically explained in plantiffs' brief (P. 39-41) and need not be reiterated here since the Commission did not make a finding with respect thereto.

Thus, those findings were not warranted in fact as many of them were erroneously attributed to the Commission and others were not bottomed on a rational basis or the product of reason and judgment. As to their justification in law, the District Court held that they should be tested by the admo-

mition of Section 15(3) and 15(7) of the Interstate Commerce Act but failed to apply those statutes to the facts. Moreover, the Court omitted pertinent portions of Section 15(3) and failed to show where the Commission had ever mentioned Section 15(7) — much less applied same — in reaching the decision under review.

In quoting Section 15(3) of the Act, the District Court conveniently omitted the fact that the statute involves cancellation of any "joint rate, fare, charge or classification" and that the buden of proof shall be upon the carrier or carriers opposing such cancellation "without regard to the provisions of Paragraph (4) of this section" concerning a reasonable preference that should be given to the carrier which originates the traffic when the Commission is prescribing through routes. The Commission was not called upon to prescribe through routes in this case and that which should have been disregarded, by the very terms of the statute, is precisely the basis upon which Southern attempted to meet its burden of proof as reflected in the lower Court's initial opinion in *Southern Railway* v. *United States, supra*, at page 750:

> "Seeking to eliminate the joint rate as existing for all routes except the direct route, (1), and **thus obtaining for itself the maximum haul without effective competition,** the Southern filed with the Commission schedules proposing to eliminate the joint rate . . ."

As to Section 15(7), the District Court points out by quoting from the statute that it is specifically and primarily concerned with investigations into the **lawfulness** of any individual or joint rate without any reference to "consistency with the public interest." Even so, the lower Court holds that the schedules must be tested by this statute but makes a finding that rates are not involved, in complete disregard to the very statutes upon which it relies.

Certainly the findings made by the Commission on re-

mand are no better than those initially condemned by the lower Court and the mere fact that the conclusions have changed in conformity with dictum statements made by the Court does not justify those findings in fact or in law. Therefore, in the absence of a rational basis, not only should the Commission's decision have been set aside but the opinion of the Court reviewing it should be reversed for the same reasons. In fact, the Supreme Court in reversing a lower court which would have enforced an administrative order called attention to legislative criticism directed against the courts for not exacting higher standards on appeal than those exercised by the agencies in *Universal Camera Corp.* v. *National L. R. Board*, 340 U.S. 474, 484:

> " . . . The 'substantial evidence' rule set forth in Section 10(e) [of the Administrative Procedure Act] is exceedingly important . . . the difficulty comes about in the practice of agencies to rely upon (and of courts to tacitly approve) something less — to rely upon suspicion, surmise, implications, or plainly incredible evidence. It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. . . . "

Even a cursory review of the opinion by the lower Court clearly reveals that only "lip service" was given to those standards; particularly so, in the light of the evidence of record and the Commission proceedings under review. Therefore, to allow such an opinion to stand would render those time-honored standards meaningless and virtually make a mockery of judicial review.

CONCLUSION

Whether form should supplant substance as a standard for judicial review of administrative decisions; whether an

interlocutory decision by a court or administrative agency may either eliminate prior issues properly raised or constitute the "law of the case"; whether the Interstate Commerce Commission or any administrative agency has the power to continue in full force and effect a prior administrative order which has been vacated by a Federal Court without relief from the court that set it aside; whether it is the function of a specially constituted Three-Judge Court to make findings *de novo* which the administrative agency whose proceeding it is reviewing was unable or unwilling to make; and whether the provisions of Section 3(4) of the Interstate Commerce Act effectively declare discrimination between connecting carriers to be unlawful in all its forms or to what extent such provisions may be qualified or limited present substantial questions for the consideration of this Court.

In fact, the answers to those questions are of vital importance as a means of providing an orderly procedure by which parties appearing before administrative agencies and the courts may be accorded the fundamental rights of justice and fair play which are implicit in our concept of ordered society.

Respectfully submitted,

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PROOF OF SERVICE

I, Albert B. Russ, Jr., one of the attorneys for plaintiffs and intervening plaintiffs, appellants herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that, on the 13th day of July, 1962, I served copies of the foregoing **statement as to jurisdiction,** together with the separate appendices attached thereto, on the several parties of record, as follows:

(1) On the United States, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to the Attorney General, Department of Justice, Washington 25, D. C., and to Floyd M. Buford, Esquire, United States Attorney for the Middle District of Georgia, U. S. Post Office Building, Macon, Georgia.

(2) On the Interstate Commerce Commission, by mailing copies, in duly addressed envelopes, with first class postage prepaid, to Messrs. Leonard S. Goodman and Robert W. Ginnane, its Counsel, to the office of the Commission, Washington 25, D. C., and,

(3) On Southern Railway and Georgia, Southern and Florida Railway, intervening defendants before the Court below, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective Attorneys of Record, i.e., (1) Mr. R. Granville Curry, 631 Southern Building, Washington 5, D. C.; (2) Mr. Henry J. Karison, Southern Railway Building, Washington 13, D. C., and (3) Mr. Charles J. Bloch, 520 First National Bank Building, Macon, Georgia.

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